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Supreme Court, U.S.
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No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LEWIS J. MERTZ,

Petitioner,

v.

THE CITY OF KEY WEST,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. If a public employee with a state-created property interest in continued employment is terminated by the governing body of the political entity that employed him, in a situation in which it was feasible to hold a pre-termination hearing, and the employee in fact received no pre-termination notice or hearing, does the employee state a claim under the procedural component of the Due Process Clause of the Fourteenth Amendment, notwithstanding the availability of a constitutionally adequate post-deprivation remedy in state court?

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

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IN THE
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LEWIS J. MERTZ,

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lewis J. Mertz respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in Lewis J. Mertz v. City of Key West, Florida, Case No. 94-5268, D.C. Docket No. 93-10072 CIV-JLK.

OPINIONS BELOW

The per curium panel opinion of the United States Court of Appeals for the Eleventh Circuit affirming the District Court's grant of summary judgment in favor of the City of Key West, Florida, is unreported, and is reproduced in Appendix A (1a-2a). The United States District Court for the Southern District of Florida's Summary Final Judgment entering summary final judgment in favor of Defendant, City of Key West, Florida, dated December 21, 1994, is unreported and is reproduced in Appendix B (3a-4a). The final order of the District Court Granting Summary Judgment, dated November 16, 1994, is unreported and reproduced in Appendix C (5a-14a).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 23, 1995. In response to a timely Application for Extension of Time to File Petition for Writ of Certiorari, this Court gave Petitioner, Lewis J. Mertz, until December 22, 1995, to file this Petition for Writ of Certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution, section 1, provides in relevant part as follows:

[N]or shall any State deprive any person of life,

liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner, Lewis J. Mertz ("Mertz") was the Major of the respondent, City of Key West, Florida's Police Department from October 18, 1989 until he was terminated, effective October 1, 1991. (R1-8-1, ¶2)[1]/. Mertz first became aware that the City of Key West, Florida (the "City") had an opening for the position of Major when he read an advertisement in Police Chief Magazine, published by the International Association of Police Chiefs. (R1-8-1, ¶3). Mertz applied for the position with the City and spoke about the position on several occasions by telephone with then-Police Chief Thomas Webster ("Chief Webster") during the summer of 1989. (R1-8-1, ¶2; R1-8-2, ¶3; R1-14-21-22).

During these conversations, Mertz was advised by Chief Webster that, if hired by the City, Mertz would be a regular employee and that, upon successfully passing his probationary period, he would receive civil service protection. (R1-8-2, ¶3). The City Commission of the City of Key West authorized the City Manager to direct Chief Webster to offer Mertz the position of Major. (R1-8-2, ¶4 Exh. A). The letter from Chief Webster, dated September

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[1] Citations are to the district court record, as certified to the Eleventh Circuit.

5, 1989, provided that Mertz would

> be allowed all benefits and rights afforded to any certified police officer, other than the Police Chief, as provided by the City of Key West and the State of Florida and will be subject to the applicable employee rules.

(R1-8-2, Exh. A).

In a letter dated September 14, 1989, Mertz accepted the position of Major and began to work for the City on October 18, 1989. (R1-8-1, ¶5 & Exh. B). At the time Mertz accepted employment with the City, he expected to receive the same benefits and rights of any other certified police officer, including civil service status. (R1-8-1, ¶6). Based on his pre-employment discussions with Chief Webster, Mertz believed that he would gain permanent status and civil service protection once he had completed a one-year probationary period. (R1-8-1, ¶7). At the time Mertz was hired and at all times throughout his employment with the City, all certified police officers other than the Chief of Police were protected under the City's Civil Service System. (R1-8-3).

Throughout his employment by the City, Mertz performed his job responsibilities in an exemplary manner. (R1-8-2, ¶9). On or about October 14, 1990, Chief Webster prepared a "Civil Service Board Work Performance Evaluation" of Mertz and stated that he had "successfully completed his probationary period." (R1-8-2, ¶9). Both

Chief Webster and Mertz believed that, once he passed his probationary period, Mertz became a permanent employee, entitled to the rights afforded City employees under the City's Civil Service Rules and Regulations (R1-8-1, ¶7; R1-8-2, ¶¶5, 10).

In July of 1991, the City Manager, George Felix Cooper (the "City Manager") submitted a budget proposal to the City Commission which included the elimination of the position of Major in the Police Department. (R1-8-8a, #7). On August 29, 1991, the City Manager wrote a letter to Mertz, informing him that his position was being abolished and that the City had decided to terminate his employment effective October 1, 1991. (R1-15-Exh. 8). On September 17, 1991, Mertz responded to the City Manger's August 29, 1991 letter and stated that "pursuant to both verbal and written agreements with City recruiters regarding [his] employment position [it was] not terminable at will" and that he was "entitled to appeal to the Civil Service Board." (R1-8-1, ¶12 & Exh. I).

On September 18, 1991, Mertz wrote to the City's Civil Service Board (the "Board") and stated that when he began his employment with the city it was represented to him that his position would be a permanent position governed by City rules and regulations, including the civil service rules. (R1-8-1, ¶13 & Exh. J). Mertz further stated that he sought to exercise his "right of appeal to the Civil Service Board and to demonstrate that the action of the City Manager ha[d] been taken out of personal malice, without just cause, and denie[d] [him] due process of both City

policy and the law in depriving [him] of employment." (R1-8-1, ¶13 & Exh. J).

On September 26, 1991, Mertz again wrote to the City Manger asking if there were any additional procedures necessary to protect his employment other than the appeal he had already filed with the Civil Service Board. (R1-8-1, ¶14 & Exh. K). On September 26, 1991, Mertz wrote again to the Board requesting advice as to any additional measures he had to follow to perfect his grievance with the City to the Board. (R1-8-1, ¶16 & Exh. M). In response, on September 27, 1991, Assistant City Manager Ron Herron wrote to Mertz that the City's Personnel Policy regarding reduction in work force was the only administrative rule that he was "aware of other than the Civil Service appeal [Mertz had] already filed that dealt with [his] situation." (R1-8-1, ¶15 & Exh. L).

Mertz was terminated from his position effective October 1, 1991. (R1-8-1, ¶17 & Exhs. N, O). On October 8, 1991, having received no response from the Board, Mertz again wrote to the Board and the City Manager advising them of his decision to appeal his termination and inquiring whether any additional action must be taken to ensure that his grievance would be heard by the Board. (R1-8-1, ¶18 & Exhs. P, Q). In a letter dated October 28, 1991, Mertz was advised that the Board had considered his request for a hearing as an item on the Board's agenda at its meeting on October 23, 1991, and that the Board had determined that it had no jurisdiction to hear his grievance. (R1-8-1, ¶22 & Exh. T).

Having received no notice that his grievance was on the agenda of the Civil Service Board, Mertz was not informed that the Board was going to consider his grievance and request for hearing at its October 23, 1991 meeting. The Board did not give Mertz an opportunity to present any evidence or witnesses to the Board or to demonstrate that he was a protected Civil Service Employee. (R1-31-App. A, ¶8). At no time did the City or the Board hold a hearing prior to terminating Mertz, to provide him an opportunity to establish whether he was a civil service protected employee. The City never provided Mertz with the opportunity available to civil service employees to bump other employees, to transfer into a vacant position, to be placed on a preferred list, or to be recalled when a position became available; nor did the City allow Mertz the right to grieve the City's failure to provide him the benefits and rights he should have been afforded as a Civil Service employee.

B. Disposition in the Courts Below

On October 8, 1993, Mertz filed the instant action in the United States District Court for the Southern District of Florida, under 42 U.S.C. §1983, asserting that he had been terminated by the City from his position of Police Major in violation of his rights to procedural due process, basing jurisdiction on 28 U.S.C. § 1331. Mertz claimed that he was terminated without just cause or reason, for false, arbitrary and unreasonable grounds, and that he was denied the right to grieve or appeal the termination decision to the City of Key West Civil Service Board. Furthermore, Mertz alleged he was not allowed to transfer into vacant positions,

to bump persons lower in rank, to be placed on a preferred list, or to be recalled when a position became available. (R1-1).

On September 16, 1994, Mertz filed a Motion, Memorandum, and supporting documentation for partial summary judgment arguing that he had a property interest in continued employment with the City and that the City discharged him without procedural due process by failing to provide him with the rights provided to civil service employees of the City, including: (i) the right to a hearing prior to being terminated; (ii) the right to bump other employees; (iii) the right to transfer into a vacant position; (iv) the right to be placed on the preferred list; (v) the right to be recalled when a position became available; and (vi) the right to grieve the City's failure to provide him the benefits and rights of a public service employee. (R1-7; R1-35).

On September 21, 1994, the City filed a Motion, Memorandum, and supporting documentation for summary judgment. (R1-16). The City argued that it was entitled to summary judgment to the extent that Mertz sought to base his claim on substantive due process, because that claim was eliminated by the Eleventh Circuit's decision in McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), cert. den., __ U.S. __, 115 S.Ct. 898 (1995). (R1-16-7). The City also argued that Mertz's procedural due process claim was barred by McKinney, because Mertz was entitled to challenge his termination and the Board's decision by certiorari review in Florida's circuit court; which he failed to utilize. (R1-16-8).

On November 16, 1994, the District Court entered a Final Order granting summary judgment in favor of the City. App. 5a-14a. Relying on McKinney, the District Court ruled that Mertz's claim that he had "a property interest in his job, that the City deprived him of this interest when it terminated his employment, and the City's elimination of [Mertz's] position for budgetary reasons was a sham" raised a substantive due process claim which was no longer viable. App. 10a-11a. As to Mertz's procedural due process claim, the District Court, again relying on McKinney, ruled that Mertz could not state a claim for denial of procedural due process in connection with his termination of employment. App. 11a-13a. The Court reasoned that "[a] due process violation is not complete 'unless and until the State fails to provide due process'" and that "'only when the State refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under §1983 arise.'" App. 11a (citations omitted). Applying that reasoning, the District Court concluded that, under Florida law, the state process provided an available procedure for Mertz to remedy the alleged procedural violation. App. 12a. First, the District Court concluded that "Plaintiff had the right to challenge both his termination and the Board's refusal to hear his grievance by writ of certiorari to the Florida Circuit Court." App. 12a. Furthermore, the District Court reasoned that "Plaintiff also could have sought a writ of mandamus to compel the Board to conduct the hearing." App. 12a.

The District Court concluded that, under the McKinney analysis, Mertz could not state either a

substantive or a procedural due process claim under 42 U.S.C. §1983. App. 13a. The District Court further stated that its jurisdiction "did not reach the issue of whether Plaintiff had a property right of continued employment, as this is a substantive determination this Court cannot make." App. 13a.

On appeal, a panel of the Eleventh Circuit affirmed, per curiam, the District Court's grant of summary judgment in favor of the City and against Mertz. The Court found that

> [p]ursuant to our recent decision in McKinney v. Pate,...we agree with the district court that Mertz cannot bring a claim for violation of his substantive due process rights in federal court. Moreover, we agree with the district court that Mertz's claim for a violation of his procedural due process rights also may not be brought in federal court because the state of Florida affords Mertz adequate remedies for alleged procedural due process violations....

App. 2a.

REASONS FOR GRANTING THE WRIT

This Petition for a Writ of Certiorari challenges the position taken by the Eleventh Circuit with regard to the application of the Due Process Clause of the Fourteenth Amendment to the termination of a public employee who has a state-created property interest in continued employment,

and who has received absolutely no pre-termination due process. Specifically, this Petition challenges the Eleventh Circuit's position that an employee who has a property interest in continued employment, and who is terminated without prior notice and an opportunity to be heard, cannot assert a federal §1983 procedural due process claim unless and until he avails himself of any and all state court remedies.[2] We demonstrate below why the challenged position raises an important question of federal law, conflicts with the law of this Court and the law of other Circuits, and therefore, warrants review by this Court.

The Eleventh Circuit, relying on its reasoning in McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), cert. den., __ U.S. __, 115 S.Ct. 898 (1995), held that Mertz could not bring a claim for a violation of his procedural due process rights "because the state of Florida affords Mertz adequate remedies for alleged procedural due process violations." App. 2a. In so holding, neither the Eleventh Circuit, nor the District Court examined whether Mertz received any pre-termination due process whatsoever. Implicit in the Eleventh Circuit's holding is the rationale that, even if Mertz received absolutely no pre-termination due process, as opposed to flawed or inadequate pre-termination due process, he is precluded from asserting a Section 1983 claim, because he did not avail himself of post-termination state law remedies. Such rationale conflicts directly with the law of this Court.

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[2] Mertz is not challenging the Eleventh Circuit's ruling on the substantive due process issue.

As announced by the Eleventh Circuit in McKinney, and applied in this case, an employee who has been denied pre-termination due process cannot bring his/her claim in federal court until he/she has pursued all available post-deprivation state court remedies. McKinney, 20 F.3d at 1563. As the Eleventh Circuit stated

> The precedent established by Parratt is unambiguous: even if McKinney suffered a procedural deprivation at the hands of a biased Board at his termination hearing, he has not suffered a violation of his procedural due process rights unless and until the State of Florida refuses to make available a means to remedy the deprivation. As any bias on the part of the Board was not sanctioned by the State and was the product of the intentional acts of the commissioners, under Parratt, only the state's refusal to provide a means to correct any error resulting from the bias would engender a procedural due process violation.

McKinney, 20 F.3d at 1563. As applied in this case, this is true even if the employee received neither notice, or an opportunity to be heard, prior to termination. Such a holding effectively wipes out a long line of Eleventh Circuit precedent to the contrary, and directly conflicts with the law established by this Court.

This Court and the Circuit Courts have repeatedly held that an aggrieved employee who has been denied his

property right to continued employment, must be provided, at the very least, with notice and an opportunity to be heard prior to termination. See e.g. Patsy v. Board of Regents, 457 U.S. 496 (1982); Cotnoir v. Univ. of Maine Systems, 35 F.3d 6, 11 (1st Cir. 1994)(employer must provide employee with notice and opportunity to be heard prior to termination); Fetner v. City of Roanoke, 813 F.2d 1183, 1186 (11th Cir. 1987)("due process has been consistently held to require pre-deprivation notice and a hearing"); Schultz v. Baumgart, 738 F.2d 231, 235 (7th Cir. 1984)(due process requires, at a minimum, "prior notice..., and a meaningful opportunity to respond prior to termination"). As this Court stated in Patsy, "[i]f he was terminated without those protections, the constitutional deprivation was then complete [and he] need not have exhausted other state remedies before bringing his §1983 claim." Patsy, 457 U.S. at 516. This Court's precedent is directly contradicted by the Eleventh Circuit's holding in McKinney, and its application in this case. The Eleventh Circuit has established a rule that, even in the absence of any pre-termination due process, an aggrieved employee is barred from pursuing a §1983 claim in federal court unless and until he/she has availed himself/herself of any and all potential state court remedies. The conclusion that Mertz has not stated a procedural due process claim under the circumstances of his termination improperly embraces an exhaustion of administrative remedies requirement for Section 1983, prohibited by this Court in Patsy, and obliterates Section 1983 procedural due process claims by terminated civil service employees in the federal courts in the Eleventh Circuit.

Between July of 1991, when the City Manager first proposed eliminating Mertz's position, and October 1, 1991, the date of his termination, the City had an abundance of time to provide Mertz with the requisite pre-deprivation due process. Because the City had ample opportunity to provide Mertz with notice and a hearing, and yet he received absolutely no pre-termination due process, as opposed to inadequate or flawed pre-termination due process, this Court's precedent dictates that his Section 1983 procedural due process claim is not barred.

This Court has repeatedly recognized that the complete lack of any pre-termination due process, as opposed to a flawed pre-termination process, cannot be remedied by post-deprivation remedies, even if these remedies are, in some sense, "adequate." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985). Furthermore, the Eleventh Circuit, in numerous pre-McKinney cases recognized that, regardless of the availability of state post-deprivation remedies, a plaintiff has asserted a viable §1983 procedural due process claim, if he/she has been completely denied pre-termination due process. See e.g. Fetner, 813 F.2d at 1186. This procedural pre-termination protection requires, at a minimum, notice of the charges, an explanation of the employer's evidence, and an opportunity to present a case. Id. See also Loudermill, 470 U.S. at 546. In the absence of such procedural pre-termination protection, post-termination remedies, no matter how "adequate," cannot remedy the due process violation. Loudermill, 470 U.S. at 546. An individual denied this most minimal of pre-termination process is not required to

exhaust state and/or administrative remedies before pursuing a §1983 procedural due process claim in federal court. Patsy, 457 U.S. at 516. See also Chaney v. Suburban Bus Div. of Regional Transp. Authority, 52 F.3d 623, 629 (7th Cir. 1995) ("due process requires pre-termination notice and an opportunity to respond even where a CBA provides for post-termination procedures that fully compensate wrongfully terminated employees"), citing Loudermill, 470 U.S. at 535-536, 542-546.

The Eleventh Circuit adopted a rule in McKinney, as applied in this case, which directly contravenes this Court's longstanding requirement that an employee with a property right in continued employment must be afforded, at the very least, notice and an opportunity to be heard prior to termination. According to the Eleventh Circuit, an employee who has been denied even these most minimal of pre-termination protections is precluded from seeking redress in federal court until he/she has exhausted all available state court remedies. Certiorari review by this Court is warranted to address the Eleventh Circuit's complete disregard of Supreme Court precedent regarding the viability of federal procedural due process claims of terminated public employees who have received absolutely no pre-deprivation due process.

In holding that Mertz was required to exhaust his state remedies before pursuing his federal claim, the Eleventh Circuit also mis-applied this Court's precedent, annunciated in Parratt v. Taylor, 451 U.S. 527 (1981), and clarified in Zinermon v. Burch, 494 U.S. 113 (1990). In

Parratt, this Court held that the availability of a constitutionally adequate postdeprivation remedy in state court satisfies the demands of procedural due process where the deprivation complained of was caused by "random and unauthorized" conduct. Parratt, 451 U.S. at 541. In Zinermon, this Court recognized a conflict among the circuits regarding the applicability of Parratt in cases where "defendant state officials had the state-clothed authority to effect a deprivation and had the power to provide the plaintiff with a hearing before they did so." Zinermon, 494 U.S. at 135-139. In an attempt to resolve the conflict, this Court held that the term "random and unauthorized" conduct, as used in Parratt, does not apply in situations where the state actor, who has "the power and authority to effect the deprivation complained of," also has the power and the duty to provide pre-deprivation due process. Zinermon, 494 U.S. at 135-139. Therefore, this Court held that, "[i]n situations where the State feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of a post deprivation tort remedy to compensate for the taking." Zinermon, 494 U.S. at 132.

In direct contravention of this Court's precedent, the Eleventh Circuit, in McKinney announced a rule, applied in this case, that the Parratt exception to pre-deprivation due process now applies even in situations where the employer who has the power and the authority to terminate the employee, also has the power and duty to provide the requisite pre-deprivation due process. As the Eleventh Circuit stated:

> [t]he precedent established by Parratt is unambiguous....[a]s any bias on the part of the Board was not sanctioned by the State and was the product of the intentional acts of the commissioners, under Parratt, only the state's refusal to provide a means to correct any error resulting from the bias would engender a procedural due process violation.

McKinney, 20 F.3d at 1563.

In applying McKinney to this case, and holding that Mertz did not have a viable §1983 procedural due process claim, because he did not avail himself of potential post-deprivation remedies, the Eleventh Circuit mis-applied Parratt, and seemingly confused this case with one where it would have been impractical or impossible to provide any pre-termination process. It is only under such circumstances that an individual is required to exhaust his/her state remedies before pursuing a §1983 procedural due process claim in federal court. See e.g., Zinermon v. Burch, 494 U.S. 113, 132 (1990); Loudermill, 470 U.S.at 542; Parratt v. Taylor, 451 U.S. 527 (1981). In sharp contrast, the City had ample opportunity, and in fact a procedure in place, to provide Mertz with the requisite pre-termination due process. Yet, the City failed to do so. Pursuant to this Court's binding precedent, where a governmental employer had ample time to provide the aggrieved employee with notice and an opportunity to be heard prior to termination, and failed to do so, the procedural due process violation is complete and the availability of state administrative and/or

judicial remedies is irrelevant. See e.g., Zinermon, 494 U.S. at 132.

In this case, because Mertz received absolutely no pre-termination due process, he immediately had a cognizable §1983 procedural due process claim and the availability of purportedly adequate post-deprivation state remedies was irrelevant.

In Loudermill, discussed above, this Court ruled that a valid §1983 procedural due process claim can be stated where the employer had failed to provide some kind of pre-termination hearing, despite the availability of adequate post-termination procedures. 470 U.S. at 546. The instant situation is analogous to that envisioned in Loudermill. Even assuming the existence and adequacy of post-termination state law remedies of writ of certiorari or writ of mandamus, the City failed to provide Mertz with any type of pre-termination hearing. Therefore, Mertz has stated a constitutionally valid §1983 claim and has appropriately brought this claim in federal court. See Fetner, 813 F.2d at 1184 ("Congress further indicated that an important aspect of [Section 1983] was that federal courts directly supervise the enforcement of these federal remedies, regardless of the existence of state courts and comparable state law remedies."). This Court's precedent teaches that once the constitutional harm has been done "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the rights of procedural due process has already occurred." Fuentes v. Shevin, 407 U.S. 67, 82 (1972). As this Court has stated, prior to adverse job action,

a public employee with a property interest in continued employment "is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Loudermill, 470 U.S. at 546.

Accordingly, circuit courts which have interpreted and applied this Court's precedent, have repeatedly held that the availability of post-deprivation state court remedies cannot cure the failure to provide at least minimal pre-termination due process. See e.g. Chaney, 52 F.3d at 629 (availability of post-deprivation remedies is irrelevant if employee was received no pre-termination notice or opportunity to be heard); Cotnoir Systems v. Univ. of Maine, 35 F.3d 6, 11-13 (1st Cir. 1994)(if employee is fired without notice, explanation of employer's evidence and an opportunity to present his side of the story, "normally the constitutional deprivation is complete," and post-deprivation remedies are irrelevant). As the Seventh Circuit stated in Schultz v. Baumgart,

> if Schultz was indeed fired in violation of his due process rights, the availability of post-deprivation grievance procedures or a board hearing would not have cured the violation. Schultz was entitled to notice and a meaningful opportunity to respond before he was terminated. If he was terminated without those protections, the constitutional deprivation was then complete. Schultz need not have exhausted other state remedies before bringing his section 1983 claim.

Schultz v. Baumgart, 738 F.2d at 237, citing Patsy, 457 U.S. at 516.

The Eleventh Circuit has adopted a rule in McKinney, as applied to Mertz, which runs afoul of this Court's precedent regarding the viability of a §1983 procedural due process claim, in a situation where an employee was denied even the most minimal of pre-deprivation process. A grant of certiorari is warranted in the instant case to address the Eleventh Circuit's position.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

[Filed August 23, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-5268

(D. C. Docket No. 93-10072-CIV-JLK)

LEWIS J. MERTZ,
Plaintiff-Appellant,

versus

CITY OF KEY WEST, FLORIDA,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(August 23, 1995)

Before BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

Appellant Lewis J. Mertz ("Mertz") appeals from the district court's grant of summary judgment in favor of appellee, City of Key West, Florida ("the City").

Pursuant to our recent decision in McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), we agree with the district court that Mertz cannot bring a claim for violation of his substantive due process rights in federal court. Moreover, we agree with the district court that Mertz's claim for a violation of his procedural due process rights also may not be brought in federal court because the state of Florida affords Mertz adequate remedies for alleged procedural due process violations. For these reasons, we affirm the district court's grant of summary judgment in favor of the City and against Mertz.

AFFIRMED.

APPENDIX B

[Filed December 21, 1994]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(CASE NO.: 93-10072-CIV-KING)

LEWIS J. MERTZ,
Plaintiff,

vs.

CITY OF KEY WEST, FLORIDA,
Defendant.

SUMMARY FINAL JUDGMENT

(December 21, 1994)

For the reasons stated in the Court's Final Order granting Defendant's Motion for Summary Judgment, it is

ORDERED AND ADJUDGED Summary Final Judgment be and the same is hereby ENTERED in favor of Defendant, City of Key West, Florida, and against Plaintiff, Lewis J. Mertz. Accordingly, it is further

ORDERED AND ADJUDGED that Plaintiff LEWIS J. MERTZ shall take nothing by this action from Defendant CITY OF KEY WEST, FLORIDA, and that Defendant CITY OF KEY WEST, FLORIDA shall go hence without day.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 21 day of December, 1994.

/s/ James Lawrence King
JAMES LAWRENCE KING
United States District Judge
Southern District of Florida

cc: Robert E. Weisberg, Esq.
Edward S. Polk, Esq.

APPENDIX C

[Filed November 16, 1994]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(CASE NO.: 93-10072-CIV-KING)

LEWIS J. MERTZ,
Plaintiff,

vs.

CITY OF KEY WEST, FLORIDA,
Defendant.

FINAL ORDER GRANTING SUMMARY JUDGMENT

(November 16, 1994)

This cause is before the court upon cross motions for summary judgment pursuant to Fed.R.Civ.P.56(c).

Lewis J. Mertz was employed October 18, 1989 as a Major in the City of Key West Police Department.[1] He served in that position until October 1, 1991, when the position was eliminated. Plaintiff alleges this action by the City of Key West violated his constitutional rights secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. Plaintiff seeks damages, a declaratory judgment, and injunctive relief, pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution.

The City denies all allegations of discrimination or other improper conduct and asserts that the position of Police Major was eliminated as part of the budgetary process for the 1991/1992 fiscal year.

I. FACTUAL BACKGROUND

In preparing the annual budget, the City Manager, in July, 1991, submitted to the City Commission proposals for budget reduction measures that included the elimination of the Police Major position. After conducting workshops on the budget, the City Manager informed Plaintiff, on August 29, 1991, that it had determined Plaintiff to be a contract

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[1]Prior to this date, the City did not have a position of Police Major.

employee whose position was to be eliminated as part of the budget process at a public hearing to be held on September 17, 1991.[2]

Plaintiff immediately wrote to the City Manager protesting the termination decision and contesting the characterization of his employment as contractual. During September, 1989, Plaintiff wrote to the Civil Service Board to state his desire to appeal the termination and to request information on how to file a grievance.[3] This request for a hearing was denied on the basis the Board lacked jurisdiction over contract employees.

The City terminated Plaintiff from his position as Police Major pursuant to the decision reached at the September 17, 1991 public hearing. The official reason for the termination was the abolition of the Police Major position. Plaintiff subsequently filed suit in this Court under the Fourteenth Amendment and 42 U.S.C. § 1983.

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[2] The letter informing the Plaintiff of this action also noted that "[a]lthough there is always the possibility that public input may cause the Commission to leave the position of Major in the budget, there is equal, if not greater, possibility that this will not happen." App.1, Mertz Aff., Exh. G.

[3] Plaintiff Mertz' Affidavit contains a more detailed listing of Plaintiff's correspondence with the City and other administrative bodies.

II. LEGAL STANDARD

Summary judgment is appropriate only where it is shown that no genuine dispute as to any material fact exists and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). In ruling on the moving party's motion, the court must view the evidence in the light most favorable to the non-moving party. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In so doing, the court "should 'resolve all reasonable doubts about the facts in favor of the non-movant' and draw 'all justifiable inferences ... in his favor.'" United States v. Four Parcels of Real Property, 941 F.2d 1428, 1437 (11th Cir. 1991) (alteration in original) (citation omitted).

Initially, the moving party bears the burden of pointing to that part of the record which shows the absence of a genuine issue of material fact. If the movant meets its burden, the burden then shifts to the non-moving party to establish that a genuine dispute of material fact exists. Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 918 (11th Cir. 1993), reh'g denied, 16 F.3d 1233 (11th Cir. 1994). To meet this burden, the non-moving party must go beyond the pleadings. If the evidence relied on is such that a reasonable jury could return a verdict in favor of the non-moving party, then the Court should refuse to grant summary judgment. Id. However, a mere scintilla of evidence in support of the non-moving party's position is

insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986).

III. Analysis

The facts as articulated above are not in dispute. The Court thus finds that there are no disputed issues of material fact that would preclude summary judgment. The issues in dispute are legal in nature and thus are appropriate for summary disposition. Specifically, the issue is whether Plaintiff may assert in federal court a claim for violation of his due process rights from the termination of his employment as Police Major.

A. Substantive Due Process

In his Motion for Partial Summary Judgment, Plaintiff contends that he has a property interest in his employment and that the City violated this interest when it abolished his position for budgetary reasons, which Plaintiff asserts are pretextual. Defendant argues that Plaintiff's claim is a substantive due process claim and is thus precluded under McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).

In McKinney v. Pate, the Eleventh Circuit, en banc, reversed a decade of precedent when it held that "in non-legislative cases, only procedural due process claims are available to pretextually terminated employees." McKinney v. Pate, 20 F.3d 1550, 1560 (11th Cir. 1994). A public

employee thus cannot raise substantive due process claims for pretextual termination under 42 U.S.C. § 1983 in federal court. Substantive due process rights "are created only by the Constitution." Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 229 (1985) (Powell, J. concurring).

State law creates employment rights and thus they are not "fundamental" rights created by the Constitution. Where state law creates such substantive rights, they are not subject to due process protection under the Due Process Clause of the Fourteenth Amendment. Id. at 1556. The Eleventh Circuit concludes that "these state law based rights constitutionally may be rescinded as long as the elements of procedural -- not substantive -- due process are observed." McKinney, 20 F3d at 1556.

Prior to McKinney, a substantive due process violation would occur "when an employer deprives the employee of a 'property interest for an improper motive and by means that [are] pretextual, arbitrary, capricious,' regardless of whether or not a hearing was held." Nolin v. Douglas County, 903 F.2d 1546, 1553-54 (11th Cir. 1990) (alteration in original) (citation omitted). Plaintiff in the instant case claims that he has a property interest in his job, that the City deprived him of this interest when it terminated his employment, and that the City's elimination of Plaintiff's position for budgetary reasons was a sham.

This Court finds that Plaintiff asserts a substantive due process claim. As McKinney makes clear, pretextually terminated public employees may bring only procedural due process claims in federal court. This Court is thus an inappropriate forum for Plaintiff's claim of pretextual termination.

B. Procedural Due Process

The Court now turns to Plaintiff's procedural due process claim. Plaintiff argues that the Civil Service Board's refusal to grant him a hearing constitutes denial of his due process rights. Defendant contends that the state provided a means to remedy the alleged procedural deprivation and that Plaintiff's failure to utilize available state procedures does not constitute a deprivation of due process.

Plaintiff's argument is without merit. A due process violation is not complete "unless and until the State fails to provide due process." Zinermon v. Burch, 494 U.S. 113, 126 (1990). The Eleventh Circuit also states that "only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." McKinney, 20 F.3d at 1556. Plaintiff argues only that the State remedies of writs of certiorari and mandamus were not appropriate in this case, but does not allege that these procedures are inadequate.

Examination of the state process reveals that Plaintiff had an available procedure to remedy the alleged procedural violation. Under Florida law, a party may petition for certiorari to the circuit court for review of an administrative agency decision that is not governed by the Administrative Procedure Act. Ceslow v. Board of County Comm'rs, 428 So.2d 701 (Fla. Dist.Ct.App. 1983). On certiorari review, the circuit court's powers are broad:

> Where a party is entitled as a matter of right to seek review in the circuit court ..., the circuit court must determine whether procedural due process is accorded ... and whether the administrative findings and judgment are supported by competent substantial evidence.

City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982). The Florida circuit courts thus review the case and consider it fully to determine whether there was due process.

For due process purposes, the state is obligated only to make available "the means by which [the employee] can receive redress for the deprivations." Parrat v. Taylor, 451 U.S. 527, 543 (1981) (footnote omitted). Clearly, Plaintiff had the right to challenge both his termination and the Board's refusal to hear his grievance by writ of certiorari to the Florida circuit court. Plaintiff also could have sought a writ of mandamus to compel the Board to conduct the

hearing. See e.g., City of Tarpon Springs v. State ex. rel. Meister, 392 So.2d 1345 (Fla. Dist.Ct.App. 1981) ("Inasmuch as mandamus is a remedy to command performance of a ministerial right and conducting the hearing was a ministerial function under the City's ordinances, the writ [of mandamus] ... compelling the City to conduct the hearing was appropriate.").

IV. Conclusion

Thus, under the McKinney analysis, this Court finds that Plaintiff cannot and has not stated a substantive or procedural due process claim under 42 U.S.C. § 1983. This Court specifically does not reach the issue of whether Plaintiff had a property right in continued employment, as this is a substantive determination this Court cannot make.

Accordingly, after a careful review of the record, and for the reasons stated herein, and the Court being otherwise fully advised, it is therefore

ORDERED and ADJUDGED that Final Summary Judgment in favor of the Defendant, City of Key West be, and the same is hereby, GRANTED.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Justice Building, Miami, Florida, this 16th day of November, 1994.

/s/ James Lawrence King
JAMES LAWRENCE KING
U.S. District Judge
Southern District of Florida

cc: Edward S. Polk, Esq.
Robert E. Weisberg, Esq.

(2)

Supreme Court, U.S.
FILED
FEB 26 1996
CLERK

No. 95-997

In The

Supreme Court of the United States

October Term, 1995

LEWIS J. MERTZ,

Petitioner,

v.

THE CITY OF KEY WEST, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an appointed, or otherwise non-classified municipal employee, whose position is eliminated for budgetary reasons, and who is not entitled to a Civil Service Board hearing upon termination, may state a procedural due process claim under the Fourteenth Amendment where a constitutionally adequate post-deprivation remedy exists in state court.

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STATEMENT OF THE CASE

Petitioner, Lewis Mertz, was interviewed for and offered the newly created position of Police Major in the City of Key West Police Department. The offer was made by letter dated September 5, 1989, from Thomas E. Webster, who was at that time the Chief of Police. (R. 1-19-1). Chief Webster's letter contained a recitation of the terms of the offer, including the date for commencement of work; starting salary; rate and time of salary increases; amounts of allowances for automobile, gasoline, and clothing; a bonus of three weeks vacation time; a provision for compensatory time or overtime; and other benefits. (R. 1-19).

Chief Webster was specifically authorized by resolution of the City Commission to transmit the letter offer. (R. 1-19-12). The appointment of Petitioner to the position of Police Major was not made pursuant to the procedures set forth in the Civil Service Rules and Regulations, and some of the consideration provided pursuant to the letter was not generally available to similar employees of the City. Appellant accepted the offer of September 5, 1989, by letter dated September 14, 1989. (R. 1-19-1, 2).

As stipulated in the exchange of letters, Petitioner began his employment on October 18, 1989. He served in the position of Police Major until September 30, 1991, when his employment with the City of Key West ended upon the City Commission's elimination of the position of Police Major at the beginning of the new budget year. (R1-19-9).

During his time with the City of Key West, there were at least two separate occasions on which Petitioner

referred to his employment agreement in order to demand and receive from the City certain benefits which were provided to him in the letter of September 5, 1989, but which were not otherwise available to employees. On July 10, 1990, Petitioner transmitted an office memorandum to David Fernandez, Finance Director, pointing out that the annual leave balance reflected in his account did not conform

> . . . to the conditions of my employment and the agreement I reached with the City upon accepting my position.
>
> According to that agreement, I was to be credited with an additional three weeks (120 hours) annual leave. I would appreciate the appropriate adjustment of my leave balance to reflect this balance, in addition to that which I have accrued to date.

(R. 1-19).

Later that year, a question arose regarding Petitioner's right to accrue and utilize compensatory time.[1] On November 20, 1990, Petitioner met with the City

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[1] Compensatory time refers to a procedure whereby employees who work beyond their customary hours are compensated for the extra time by taking an equivalent amount of time without deduction from their otherwise accrued vacation or other leave time. By accumulating a lot of compensatory time, an employee could potentially take off as much time as he or she desires without diminishing the available bank of vacation or other leave time. In August 1990, the City Manager eliminated the use of compensatory time for management employees of the City.

Manager and Chief Webster to discuss the matter. Following that meeting, he transmitted an office memorandum to Mr. Fernandez dated November 29, 1990, with copies to the City Manager, Chief of Police, and Director of Human Resources. Significantly, Petitioner referred to the subject of his memorandum as "Employment Agreement". He further stated that he had met with the City Manager and the Police Chief,

> . . . to discuss the provisions of my employment agreement as regards the payment of overtime or compensatory time. After being supplied a copy of the employment agreement by me, the City Manager agreed that I should continue to earn overtime or compensatory time as provided therein.
>
> * * *
>
> Although I realize that oversights and errors can easily occur, I am concerned inasmuch as the City Manager indicated that he was unaware of the provisions of the employment agreement before he was provided a copy by me and inasmuch as his "City Policy on Compensatory Time," directed to you on August 24, 1990, was applied retroactively to erase the balance already accrued. . . .

(R. 1-19).

On both occasions, the City honored its contract with the Petitioner, providing the requested benefits.

As part of the budget process in July of 1991, the City Manager was directed by the Commission to submit a list of expenditures which could be eliminated. (R. 1-20). The

position of Major in the City of Key West Police Department was included on that list, and ultimately accepted by the Commission. (R. 1-20). The City Manager, Felix Cooper, notified Petitioner in a letter dated August 29, 1991, that the elimination of the Petitioner's position and consequent termination of his employment was on the City Commission agenda for September 17, 1991. (R. 1-19-9). Cooper's letter advised Mertz that his letter of agreement was considered to be an employment contract, and that since no term of employment was specified, his employment was considered to be terminable at will. Mertz and others had previously appeared before the Commission on various occasions to advocate retaining the position of Major. (R. 1-21).

When the position of Police Major was abolished, Petitioner was determined to be a contract employee by virtue of the nature and terms of his employment relationship. (R. 1-19). Contract employees and others appointed by the City Commission are not members of the civil service system.[2] (R. 1-20). Accordingly, Petitioner was not provided civil service benefits at that time. He did, however, attempt to file a grievance with the Civil Service Board regarding the termination of his employment. The Civil Service Board (which operates independently of the City Manager and the City Commission), unanimously determined that Mertz was a contract

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[2] The fact of whether Petitioner was a civil servant or not, thereby entitling him to certain procedural due process, remains disputed. Neither of the courts below made a specific determination as to Petitioner's employment status. However, for purposes of this Brief, we have assumed that Petitioner was a civil servant.

employee and therefore had no civil service eligibility. (R. 1-19). Following that decision, Petitioner did not pursue any state remedy, but simply proceeded to file suit in the United States District Court for the Southern District of Florida. (R. 1-1)

Petitioner filed suit in the district court alleging that he was a civil service employee and further contending that he had a property interest in his position which was taken from him without due process of law. (R. 1-1) Petitioner also claimed to have been denied equal protection on the basis that he was discharged from his employment on false, arbitrary, and unreasonable grounds.

The City of Key West filed a Motion for Summary Judgment, Or, Alternatively, To Dismiss For Failure To State A Claim On Which Relief Can Be Granted. (R. 1-11). The essence of the motion was that pursuant to the Eleventh Circuit Court of Appeals' decision in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), Petitioner's claim was one for violation of procedural due process. As the State of Florida had available procedures to rectify any due process violations which may have existed, Petitioner could not file suit in federal court. The City also asserted that Petitioner was a terminable-at-will contract employee not entitled to civil service protection.

The district court granted the City's Motion and summary final judgment was entered for the City of Key West on December 21, 1994. (R. 1-36, 1-41). The district court found that the Petitioner raised a substantive due process

claim which could not be pursued in federal court, applying *McKinney*.[3] Id. The district court also found that Petitioner could not pursue his procedural due process claim in federal court because a state court remedy for the alleged procedural violation had been available to him. Specifically, the district court found that Petitioner could have pursued the remedies of certiorari or mandamus.

Petitioner appealed the district court's decision to the Eleventh Circuit Court of Appeals. (R. 1-38). The Eleventh Circuit affirmed the district court's decision, relying on *McKinney, supra*. (Petitioner's Appendix A). The Eleventh Circuit further agreed with the district court that the State of Florida afforded Petitioner adequate remedies for his alleged procedural due process claims. (Petitioner's Appendix A).

ARGUMENT

The Court should not accept certiorari jurisdiction because the Eleventh Circuit Court of Appeals' decision does not conflict with *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), or any other decisions of the various circuits or of this Court.

As a preliminary matter, neither the district court nor the Eleventh Circuit Court of Appeals found that the Petitioner actually had a state-created property interest in his employment, despite the fact that Petitioner has

[3] Petitioner is not challenging the lower courts' rulings with respect to his substantive due process argument. (Petition for Writ of Certiorari at 11, n. 2).

framed the issue as one determining the constitutional rights of a "public employee with a state-created property interest in continued employment." (Petition for Writ of Certiorari at i).

Although Petitioner has framed the issue on appeal in such a way as to imply that he was in fact a "public employee with a state-created property interest in continued employment," that issue has not been determined in his favor. (Petition for Writ of Certiorari at "i", 10). Nor is the issue important since it is undisputed that Petitioner made no efforts whatsoever to avail himself of available state remedies to address his procedural due process concerns. Since *McKinney* holds that an employee must first avail himself of state remedies, it is clear that the Eleventh Circuit's opinion in this case is in accord with *McKinney*.

Only that portion of *McKinney v. Pate*,[4] 20 F.3d 1550 (11th Cir. 1994), which held that a public employee with a

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[4] In *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), the Eleventh Circuit, sitting en banc, held that a state employee *possessing a state-created property interest in his employment* is entitled to assert only procedural due process claims, and has no substantive due process claim.

In *McKinney*, a building official was terminated, after he refused to resign, at the instruction of a member of the Board of County Commissioners. McKinney brought a federal claim under 42 U.S.C. § 1983, claiming that the reasons given for his termination were pretextual, and that the real reason was that he was strictly enforcing building codes to the distress of a commissioner, who was employed by a construction subcontractor.

The court noted that public employment cases are generally outside the scope of substantive due process, because they involve state-created rights, whereas substantive due process

state-created property interest in continued employment could not maintain his procedural due process claim in federal court is relevant here.[5]

The *McKinney* Court held that its prior case law was in error to the extent it allowed a terminated employee to bring a federal claim under § 1983 before utilizing state remedies which were appropriate and available. 20 F.3d at 1560. Even where the state's procedure is *inadequate*, no procedural due process claim arises until the state fails to remedy the inadequacy. Id., citing *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975 (1990). The appropriate forum for such claims is not a federal court, but a state court possessing the ability to remedy the alleged procedural defect. Such a forum could prevent or remedy the procedural imperfection, and thereby obviate any federal claim. *Id.* at 1561.

Procedural due process claims test the availability of an adequate procedure under state law, rather than the actual outcome of the proceedings. Thus, even if Petitioner suffered a procedural deprivation with regard to either his termination or the Civil Service Board's dismissal of his grievance, he nevertheless suffered no violation of his procedural due process rights unless the state

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arises only from the Constitution. 20 F.3d at 1556. Thus, a public employee has no claim for substantive due process in wrongful termination cases, and can only seek relief on a procedural due process theory.

[5] The Petitioner does not challenge the Eleventh Circuit's ruling on the substantive due process issue. (Petition for Writ of Certiorari at 11).

refused to provide a means to remedy the deprivation. *McKinney*, supra, at 1563.

Petitioner maintains that, unlike McKinney, he has stated a § 1983 procedural due process claim because he received no procedural due process whatsoever, as opposed to flawed or inadequate proceedings. As part of his argument on this point, Petitioner has maintained that he was a civil service employee. Civil service employees have rights that do not inure to employees who are not entitled to civil service protection.[6] The scope of those rights is not an issue here. The sole issue is whether the State of Florida affords due process to employees who claim to have been deprived of those rights. For purposes of this Court's function in reviewing the Petition for Writ of Certiorari, we will assume that Mertz was a civil service employee. Nevertheless, for the record, Respondent must correct factual misstatements made by Petitioner with regard to his employment status.

Contrary to Petitioner's suggestion, not all permanent employees of the City of Key West are entitled to civil service protection. Elected officials, appointments by the City Commission, contractual employees and employees holding positions not within the Classified Service are specifically not under the jurisdiction of the Civil Service Board, and are thus not entitled to civil service protection. It has been the position of the City of Key West throughout these proceedings that Petitioner

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[6] Respondent strenuously maintains that the Petitioner was a contract employee, as a result of which he was not entitled to civil service protection, and therefore is not entitled to the rights which accompany that protection.

was a contractual employee, and was thus not within the jurisdiction of the Civil Service Board.

Petitioner has argued that had he been properly treated as a civil service employee, he would have been entitled to a grievance hearing before the Civil Service Board to review the elimination of his position. The Petitioner is wrong for two reasons. First, neither the City Charter nor the Rules and Regulations of the Civil Service Board provides that the Civil Service Board has the authority or jurisdiction to review a decision of the City Commission which eliminates a position for *budgetary reasons*.[7] Second, if the Petitioner was entitled to civil service status, he would not be entitled to a grievance hearing to review the elimination of his position for budgetary reasons.

Petitioner maintains that his procedural due process claim is not barred by *McKinney*, as he received *no* process. Petitioner argues that *McKinney v. Pate* is only applicable where a terminated employee has been afforded deficient process. In other words, Petitioner asserts that *McKinney* does not apply where no due process was afforded. It is difficult to determine the basis for Petitioner's conclusion. If anything, an employee who has been afforded *no* due process has an even better chance of availing himself successfully of state court procedures, which are faster and less expensive. Petitioner has not

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[7] The establishment of a budget by the City Commission is a legislative function. *House of Representatives v. Martinez*, 555 So.2d 839 (Fla. 1990). The Civil Service Board is prohibited by the doctrine of separation of powers from reviewing or overruling legislative determinations by another agency. *Chiles v. Children A, B, C, D, E, and F*, 589 So.2d 260 (Fla. 1991).

cited to any portion of the lower courts' opinions imposing such a limitation, and Respondent has been unable to find such a restriction in either decision.

McKinney happened to involve an employee who was terminated for allegedly pretextual reasons and who was afforded a hearing. As the Eleventh Circuit observed, McKinney was given written notice of the charges against him, an explanation of the evidence against him, and an opportunity to present his side of the story. However, nothing in the opinion suggests that *McKinney* is limited in its application to situations where a hearing is held, but the hearing is alleged to be defective.

Even were Petitioner correct, the limitation that he reads into *McKinney* would not operate to his benefit. Petitioner erroneously believes that the elimination of his position for budgetary reasons entitled him to a hearing *prior* to his discharge. This reasoning of course presupposes that Petitioner was entitled to civil service protection, which remains vigorously disputed. Petitioner relies upon pre-*McKinney* cases for the proposition that a constitutional deprivation exists where no hearing was allowed, even if post-deprivation remedies are provided through state law. According to Petitioner, a claim pursuant to 42 U.S.C. § 1983 exists for the deprivation of procedural due process rights where no hearing was held, regardless of the availability of post-deprivation remedies through the state court system.

The pre-*McKinney* cases which Petitioner urges conflict with the lower courts' decisions in this case are no

longer viable in light of *McKinney*. Even if those authorities remain valid, they have no application in this instance.

First, Petitioner was not entitled to a pre-termination hearing. Secondly, notwithstanding that he was not entitled to a pre-termination hearing, Petitioner was given notice that a hearing was going to be held on the elimination of his position, and was given an opportunity to appear at that hearing. Notably, Petitioner was *not* terminated because of alleged misconduct. Accordingly, this is not a situation where it would have been necessary or appropriate or even possible to provide Petitioner with written notice of any "charges" against him, and an evidentiary hearing on those charges. Petitioner lost his employment with the City of Key West because his position was eliminated for budgetary reasons.

Even the Rules and Regulations of the City of Key West Civil Service Board, upon which Petitioner sought to rely below, do not mandate a pre-termination hearing when the City Commission eliminates a position for budgetary reasons. Rule VI, Sub-Part E, Section 1.0 of the City's Rules and Regulations addresses the rights afforded an employee when his position is abolished, providing that an employee whose position is eliminated due to court action or Commission abolishment of his position is entitled to be placed back in the last permanent position he previously held. The rules do not allow for a pre-termination hearing when an employee's position is *eliminated*.

The City Code also enunciated procedures to be followed when the position of a civil service employee was

eliminated for budgetary reasons.[8] The City Code does not even provide for a hearing when an employee is being demoted or discharged for cause, let alone when an employee is being discharged because of budgetary reasons.[9] The only provision in the Personnel Policy Manual pertaining to an elimination in a position due to a reduction in force also does not provide for a pre-termination hearing.[10]

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[8] Code § 6.15: Reduction in Number of Employees

> Whenever it shall appear to the city manager than (sic) an excessive number of persons are employed within any department of the city or, due to budget adjustments, there will be an excess of persons employed within any department of the city, said city manager shall inform the city commission and include the reasons therefor that have caused or will cause an excess of employees within city government. The city manager shall provide to the civil service board the name and title of each employee terminated for inclusion within the civil service preferred list.

This provision does not allow for a hearing, but does call for the inclusion of the employee's name on the civil service preferred list.

[9] Code § 6.13 applies where the City is terminating or disciplining an employee because of misconduct or a failure to properly perform. In such circumstances, no action shall be taken except for cause shown upon written charges or violation of the City's personnel policy rules and regulations or rules of the Civil Service Board.

[10] The pertinent provision provides:

> e. Reduction in Force
>
> When the demand for service in a particular field decreases to the point that it is apparent that there is an excess of employees within that field, the City shall attempt in all cases to transfer those employees

In short, none of the rules and regulations promulgated by the City of Key West through the Civil Service Board, or otherwise, provide for a pre-termination hearing where a position is being eliminated for budgetary reasons. And since a budget-induced termination has nothing to do with the employee's performance or conduct, even if we assume that Mertz was a civil service employee, he still was not entitled to a pre-termination hearing when his position was eliminated for budgetary reasons. *Hatcher v. Board of Public Educ. and Orphanage*, 809 F.2d 1546 (11th Cir. 1987). In *Hatcher*, the court addressed the claim of a school principal who had been demoted as a result of the closing of the school at which she had been principal. In total, six principals were displaced as a result of school closings, but only three principal positions were available at the time of the closings.

The court concluded that the Board was not required to grant Hatcher a hearing at the time the schools were closed and the initial reassignments were made. Hearings were not required until later stages in the process, when

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not needed to vacant positions of the same class in the same or other departments. However, when this is not possible, a reduction in force must take place, and the City Commission shall be so advised by the City Manager.

In making discharges, the person who stands lowest in rank or grade *and lowest in point of seniority* shall be first laid off. Persons discharged under these circumstances shall be placed on a preferred list in Civil Service files and re-employed according to the rules laid down in the Civil Service Board Rules and Regulations and in labor agreements, where applicable. (emphasis added).

positions were assigned to individuals who did not hold a property interest in the position rather than to Hatcher and others similarly situated.

Although *Hatcher* is to a large extent limited to its facts, it demonstrates that a pre-termination hearing is not constitutionally required in every situation where a position is being eliminated for budgetary reasons. The reason why a pre-termination hearing is not required when a position is being eliminated for budgetary reasons is readily apparent. This is a discretionary function of a legislative body. In most instances, as here, the employee has notice of the public session at which the budget is to be discussed and adopted, and thus has an opportunity to be heard.

An employee rarely can present any information or evidence which will convince a public body that sufficient money exists to retain a position, or that the position is so valuable that it must be retained despite economic hardship. On the other hand, when an employee is being terminated for reasons related to the employee's own conduct, the employee can often present evidence to refute the charges against him. In the instant case, Petitioner has not identified anything that he would have said or done at an individual pre-termination hearing which could not have been raised at the Commission's budget meeting of September 17, 1991. Nothing could have been said or done by Petitioner or anyone else whose position was eliminated, which would have altered the Commission's decision.

Despite the fact that Petitioner was *not* entitled to a pre-termination hearing, the fact remains that he was

actually afforded an opportunity to be heard. Petitioner was given advance notice that his position was likely to not be included in the budget. The City Manager notified Mertz in a letter dated August 29, 1991, that the elimination of his position and consequent termination of his employment was part of the budget adoption which was on the City Commission agenda for September 17, 1991. Petitioner and others had previously appeared before the Commission on various occasions to advocate retaining the position of Major. Petitioner had the opportunity to appear at the September 17, 1991, hearing along with his supporters to argue why his position should not be eliminated. That opportunity to be heard, coupled with the post-termination remedies afforded by the State of Florida satisfies any procedural due process concerns to which Petitioner may have been entitled.

No set format exists for a constitutionally sufficient pre-termination hearing. As identified by this Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1984), the essential requirements of due process are notice and an opportunity to respond. Petitioner was afforded both notice and an opportunity to respond by the City Commission. He received due process. Thus, the Eleventh Circuit's decision does not conflict with *Loudermill* as Petitioner contends.

Petitioner also asserts that he was afforded *no* due process at all because the Civil Service Board improperly refused to hear his grievance, thus further depriving him of due process. Whether the Petitioner was entitled to civil service protection is not at issue here. The Civil Service Board considered Petitioner's request to pursue a

grievance, and determined that it did not have the jurisdiction to afford such relief to Petitioner.

Instead of pursuing state court remedies to compel the Civil Service Board to provide him with a hearing, Petitioner filed suit in the district court pursuant to 42 U.S.C. § 1983. Pursuant to *McKinney*, Petitioner has no cause of action for this alleged deprivation of procedural due process, as the State of Florida affords him adequate remedies for the alleged deprivation.

A procedural due process violation is not complete "unless and until the State fails to provide due process." *Zinermon v. Burch*, 494 U.S. 113, 123 (1990). In other words, the state may cure a procedural deprivation by providing a later procedural remedy; only when the state *refuses* to provide a process sufficient to remedy the procedural deprivation is there a constitutional violation actionable under § 1983. *McKinney*, 20 F.3d at 1557. The focus therefore is not whether Appellant was afforded deficient due process or even none at all by the City; rather, the focus is on whether the State of Florida affords a process sufficient to remedy the alleged procedural deprivation. As the Eleventh Circuit concluded in *McKinney*, Florida courts have the power to review employment termination cases. That authority includes the power to remedy deficiencies and to cure violations of due process.

Finally, the Petitioner had available to him state court relief in the form of either certiorari or mandamus. In the absence of a method of review contained in the statute under which an administrative body operates, the quasi-judicial actions of an administrative agency may be reviewed through a writ of certiorari to Florida's circuit

courts. *Dabbs v. City of Tampa*, 613 So.2d 1378, 1379-1380 (Fla. 2d DCA 1993) (citing *Teston v. City of Tampa*, 143 So.2d 473 (Fla. 1962)). The October 23, 1991, decision of the Civil Service Board was a quasi-judicial action.

The Civil Service Board only has jurisdiction to hear the grievances of those individuals who fall within the Civil Service Rules and Regulations. Those employees not covered by the Civil Service Rules and Regulations are not within the jurisdiction of the Civil Service Board.[11] In determining that Mertz was not covered by the Civil Service Rules and Regulations, the Civil Service Board was making a determination that, as a matter of law, it lacked jurisdiction to act. An organization's determination that it lacks jurisdiction qualifies as a judicial or quasi-judicial action.

A decision by a civil service board that it lacks jurisdiction has been determined by a Florida appellate court to be a quasi-judicial decision properly reviewable by certiorari. *DeNigris v. City of Fort Lauderdale*, 518 So.2d 469 (Fla. 4th DCA 1988) (decision of city civil service board that it lacked jurisdiction over police officer's appeal was a quasi-judicial decision properly reviewed by petition for writ of certiorari). No authority holds to the contrary.

Certiorari was available to Petitioner as a remedy. Petitioner filed a written submission to the Civil Service Board. The minutes of the meeting of the Civil Service Board on October 23, 1991, coupled with the letters between Appellant and Appellee documenting the terms

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[11] *The City of Key West Civil Service Board Rules and Regulations*, Rule I, Sub-Part F, § 1.0.

of Appellant's employment, Appellant's written submission and the Charter, Code and Personnel Policies cited by Appellant to this Court provided an ample record on which a state court could have determined whether the Civil Service Board improperly interpreted its own rules and regulations and erroneously declined to accept jurisdiction over Appellant's claim.

Alternatively, mandamus would have been an available remedy. Petitioner could have filed a petition for writ of mandamus seeking to compel the Civil Service Board to afford him a full hearing, pursuant to adequate notice, on the issue of his entitlement to civil service protection.

Florida appellate courts have routinely held that mandamus is an appropriate remedy to test the correctness of a determination of no jurisdiction. *Pino v. District Court of Appeal, Third District*, 604 So.2d 1232 (Fla. 1992); *New Hampshire Ins. Co. v. Calhoun*, 341 So.2d 777 (Fla. 2d DCA 1976), aff'd., 354 So.2d 882 (Fla. 1978). If, after a full hearing pursuant to notice, the Civil Service Board still maintained that it did not have jurisdiction over Mertz, Mertz would have a record and a quasi-judicial decision to pursue certiorari review.

Finally, Mertz could have filed a declaratory judgment action, pursuant to Florida Statutes Chapter 86, to obtain a finding as to whether he was entitled to the protection afforded by the Civil Service Rules and Regulations.

A declaratory judgment action would have enabled Mertz to establish his claimed status as a civil service employee entitled to due process. Florida Statutes

§ 86.011 authorizes the circuit court to declare "rights, status and other equitable or legal relations." In making such a declaration the circuit court may also declare any fact upon which the declaration depends. Thus, the circuit court was authorized to declare whether Petitioner was a civil service employee even if factual determinations must first be made.

The circuit court is authorized pursuant to Florida Statutes § 86.021 to construe statutes and regulations made under statutory authority or municipal ordinance. The circuit court therefore had authority to construe the code provisions relied upon by the Petitioner. A declaratory judgment action also would have enabled Mertz to obtain a determination of his rights under his contract with the City. *Sorrentino v. Barwick*, 412 So.2d 55 (Fla. 4th DCA 1982); *Ennis v. Warm Mineral Springs, Inc.*, 203 So.2d 514 (Fla. 2d DCA 1967), cert. den., 210 So.2d 870 (Fla. 1968).

Had Petitioner established through a declaratory judgment action that he was entitled to civil service protection, he could then have requested that the circuit court direct the Civil Service Board to afford him a hearing. Florida Statutes § 86.061 authorizes the circuit court to grant further relief based on a declaratory judgment when necessary or proper.

In summary, Petitioner had adequate remedies available to him in the Florida state court system. He chose not to pursue those remedies, choosing instead to file suit in federal court. Pursuant to the court's decision in *McKinney v. Pate, supra*, Petitioner made the wrong choice.

CONCLUSION

The Eleventh Circuit Court of Appeals' decision does not conflict with *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) or any other decisions of this Court or the various circuits.

For the foregoing reasons, the Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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